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Evidence--Lie Detector Testimony Admissible on Stipulation

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must not only be *some* evidence tending to support the plaintiff's claim, but that evidence must be of such quality and quantity as to justify the jury in basing a verdict thereon in favor of the plaintiff. 10A BLASHFIELD, AUTOMOBILE LAW AND PRACTICE sec. 6592 (Perm. ed. 1954). Otherwise the application of a rule involving such uncertain terms would lead into the realm of conjecture and verdicts based on the barest of possibilities. *Cleveland-Akron Bag Co. v. Jaite,* 112 Ohio St. 506, 148 N.E. 82, 84 (1925).

There can be no ready test to guide the judge in ruling on the sufficiency of such circumstantial evidence. Each ruling must necessarily depend upon the nature of the evidence in the case under consideration. In the words of Justice Cardozo, "One struggles in vain for any verbal formula that will supply a ready touchstone." Perhaps if the West Virginia Court had embraced the rebuttable presumption arising from ownership of the vehicle, trial court judges would have had a yardstick or touchstone to guide them should like situations arise in the future.

William Thomas Harrison

Evidence—Lie Detector Testimony Admissible on Stipulation

D, accused of possession of narcotics, agreed by written stipulation with his counsel and the prosecution to submit to a polygraph (lie detector) test, the results of which were to be admissible in evidence at trial. A polygraph operator was accordingly allowed to testify at trial over *D*'s objection, and gave evidence unfavorable to *D*. *D* was convicted and, on a certified question, the Arizona Supreme Court held that lie detector evidence "has developed to a state in which its results are probative enough to warrant admissibility on stipulations," at the discretion of the trial judge. The parties were given the right to examine (a) the qualifications and training of the polygraph examiner, (b) the conditions under which the test was administered, (c) the technique of interrogation used, and (d) any other matters the trial court deemed pertinent. The jury was instructed that polygraph testimony does not tend to prove or disprove any element of the crime charged, but only indicates that at the time of the examination the accused was or was not telling the truth; and it is for the jury to determine the corroborative weight and effect such testimony should be given. *State v. Valdez,* 371 P.2d 894 (Ariz. 1962).

The theory of lie detection by polygraphic interrogation is that lying causes emotional reactions and disturbances on the part of the one being examined. These reactions cause involuntary changes in respiration rate, pulse response, and blood pressure. The polygraph records these changes and, when the results are interpreted by one trained in polygraph interrogation and examination, the examiner will normally form an opinion as to whether the examinee answered designated questions truthfully. Various studies have been made and results offered as to the reliability of lie detector tests. One set of conservative figures indicate that (1) in 75-80 per cent of the cases examined polygraph results correctly reflect the guilt or innocence of the accused; (2) inconclusive results were obtained in 15-20 per cent of the cases examined; and (3) 5 per cent or less is the maximum margin of provable error. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 76 (2d ed. 1948). The results indicated were taken from several thousand polygraph examinations over a period of sixteen years. Other studies indicate a maximum probable error at 2 to 5 per cent. The primary source of error is the failure to detect deception on the part of hardened criminals, and therefore the bias tends toward acquitting the guilty rather than convicting the innocent. 22 TENN. L. REV. 713 (1953). In a five year study involving 4,280 criminal suspects, an accuracy of 95 per cent was claimed, and a subsequent study of some 8,450 persons resulted in the same percentage breakdown. INBAU & REED, LIE DETECTION AND CRIMINAL INTERROGATION, 111-12 (3d ed. 1953). On the basis of these and similar studies, there is authority that polygraph results are as accurate and reliable as other presently accepted methods of determining facts. MCCORMICK, EVIDENCE §174 (1954).

The first reported American case involving the admissibility of lie detector evidence was *Frye v. United States,* 293 Fed. 1013 (D.C.Cir. 1923). Frye was denied admissibility of the results of a systolic blood pressure test to which he had submitted. An appeal court observed that ". . . while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle. . .(it) must be sufficiently established to have gained general acceptance in the particular field in which it belongs." This language has been echoed in almost all subsequent decisions concerning the admissibility of lie detector evidence. A sole appellate case, *People v. Kenny,* 3 N.Y.S.2d 348 (1953), permitted lie detector evidence in the absence of stipulation. The force of this decision was modified, if not completely erased, by a subsequent New York decision of the

same year. *People v. Forte,* 279 N.Y. 204, 18 N.E.2d 31 (1938). The *Forte* case, without reference to the *Kenny* holding, denied the admissibility of lie detector evidence. For a discussion holding the cases distinguishable, see 29 CORNELL L.Q. 535 (1944). See also *People v. Ford,* 304 N.Y. 679, 107 N.E.2d 595 (1952), indicating the *Forte* case is controlling.

The admissibility of lie detector evidence upon stipulation is not settled, although several states and the District of Columbia, have admitted this evidence upon stipulation. Trial judges using this procedure feel it is of substantial aid in sharply disputed issues of fact. 22 TENN. L. REV. 711, 715 (1953). The trend seems definitely to be in the director of admitting lie detector test results on stipulation, and possibly a majority of jurisdictions would do so. RICHARDSON, MODERN SCIENTIFIC EVIDENCE § 10.14 (1961). West Virginia reports no cases involving the use or attempted use of lie detector evidence, but admissions and agreements made by parties in open court are binding if acted upon by the court. *McCoy v. McCoy,* 74 W.Va. 64, 81 S.E. 569 (1914). For cases where lie detector evidence was refused, even upon stipulation, see *State v. Trimble,* 68 N.M. 406, 362 P.2d 788 (1961), and *Stone v. Earp,* 331 Mich. 606, 50 N.W.2d 172 (1951).

Judicial reluctance to recognize lie detector evidence may be justified, as even if polygraph tests are properly administered, the results are subject to error. Extreme emotional tension, physiological or mental abnormalities, or unresponsiveness on the part of the one being examined can conceal detection, as can a hardened conscience or a lack of fear of detection. In addition to the difficulties involved in testing and interpretation, and the question as to the scientific reliability of lie detection devices, the principal case noted that there can be (1) a tendency for juries to treat polygraph evidence as conclusive on the issue of the accused's guilt, (2) a lack of standardization of test procedure, and (3) a difficulty in jury evaluation of polygraph examiner's opinions. There is also a danger that refusal to submit to a lie detector test, if such tests should become generally admissable, might be interpreted by a jury as an admission of guilt. It has been suggested that the right to refuse to submit to a lie detector test is guaranteed by the principles of due process. 69 HARV. L. REV. 683 (1955). Criticism of lie detector and similar test results does not demand their non-acceptance in all fields. Lie detectors have found wide use and acceptance in industry and in interrogation of

criminal suspects. 70 YALE L.J. 694, 724 (1961). Lie detectors have been valuable in determining the validity of paternity claims. 4 DE PAUL L. REV. 31 (1954). It is well settled that confessions obtained by the use of lie detectors are admissible if otherwise properly obtained. Annot., 23 A.L.R. 2d 1310 (1952).

In preliminary investigations as distinguished from judicial litigation, the use of lie detectors seems to have passed beyond the experimental stage. Several states allow lie detector evidence upon stipulation, and upon the theory that absolute infallibility is not the standard for admissibility of scientific evidence. The status of lie detector evidence in West Virginia seems an open question although the use of polygraph evidence has been advocated in 48 W.VA. L.Q. 37 (1941-2). The eventual admission of lie detector evidence does appear feasible, with further investigation and research into interrogation techniques, the formulation of standards for polygraph examinations, and the use of multiple scientific techniques to record the reactions of those being examined.

John Everett Busch

Federal Courts—Personal Jurisdiction Not Required in Transfer to Cure Venue Defect

Anti-trust action was transferred from the district court in state A to the district court in state B because of improper venue. Court B dismissed the action on the grounds that court A lacked authority to transfer the action since it did not have personal jurisdiction over the *Ds. Held,* reversed. 28 U.S.C. § 1406(a) (1958), permits the court in the district in which the action is filed to transfer it to another district, when venue is laid in the wrong district, if it be in the interest of justice, whether the court in which the action was originally filed had personal jurisdiction or not. *Goldlawr, Inc. v. Heiman,* 369 U.S. 463 (1962).

Prior to 1948 if the defendant's objection to improper venue was sustained the action had to be dismissed, because there was no machinery to transfer the case. To avoid this harsh rule, in 1948, Congress enacted a provision which provided for a transfer to a court in which venue was proper. 28 U.S.C. § 1406(a) (1948). In 1949, this provision was amended to provide for a dismissal or "if it be in the interest of justice" to transfer to a district in which it could have been brought. 28 U.S.C. 1406 (a) (1958). This amendment was